IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-492

~~UNITED STATES OF AMERICA,~~

~~*Petitioner,*~~

by DOROTHY S. GREENBERG,
for herself as well as for the United States of America,
*Relator-Petitioner*

— against —

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED, BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTHHOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS J. KULUKUNDIS, SUMMIT MARINE OPERATIONS, INC., SUMMITT I, INC., SUMMITT II, INC., SUMMITT III, INC., CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPORTATION CORPORATION, C.Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT INC., LIQUEGAS TRANSPORT INC., JAMES DURBIN, JOHN C. BULLITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC., GENERAL AMERICAN TRANPORTATION CORP., GENERAL DYNAMICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMARLEASE (BURMAH LNG CARRIER) INC., CITIMARLEASE (BURMAH LIQUEGAS), INC., and CITICORP,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner Dorothy S. Greenberg, individually as well as for the United States of America respectfully prays that a Writ of Certiorari issue to review the affirmation by the United States Court of Appeals for the Second Circuit of the judgment of the federal district court below dismissing the Petitioner's *qui tam* action for lack of jurisdiction. This case involves novel questions of federal law pertaining to the proper statutory constructions of federal law pertaining to the proper interpretation of the jurisdictional provisions of the False Claims Act (31 U.S.C. §231 *et. seq.*) and the propriety of the application of those provisions so as to bar the Petitioner's *qui tam* action based upon documents which were admittedly not in the United States' Government's possession at the time she filed suit. The Petitioner's action brought to light an alleged fraud being perpetrated upon the United States Government by a foreign corporation which availed itself of U.S. financing for ship construction purposes, contrary to the statutory prohibitions of the Merchant Marine Act of 1936, by organizing dummy corporations in the United States.

## OPINIONS

The Opinion of the Court of Appeals for the Second Circuit is reported at 558 F.2d 43 (1977), and appears in the Appendix at page A.2. The Court of Appeals' Order denying the Petition for Rehearing and Rehearing En Banc on July 1, 1977 appears at page A.2. The Court of Appeals' Order denying the Petition in the Appendix at page A.9. The unreported Memorandum Opinion of the federal district court below appears in the Appendix at page A.10.



## JURISDICTION

The Court of Appeals for the Second Circuit affirmed the judgment of the federal district court on May 11, 1977. A timely Petition for Rehearing and Rehearing on En Banc was denied on July 1, 1977. This Petition for Certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254 (1) (1970).

## QUESTIONS PRESENTED

### I.

Whether an erroneous application of the jurisdictional provisions of the False Claims Act should be allowed to prevent a thorough judicial examination of a major fraud being perpetrated upon the United States Government by a foreign corporation which has availed itself of U. S. financing for ship construction purposes, contrary to the Merchant Marine Act of 1936, by organizing dummy corporations in the United States which have applied for and secured construction differential subsidies and federal guarantees of debt obligations that are only available to U.S. citizens.

### II.

Whether the jurisdictional provisions of the False Claims Act should be interpreted and applied in a manner which bars access to the federal courts by a private citizen having possession of material documents and information evidencing the perpetration of a major fraud against the United States Government.

## STATUTORY PROVISIONS INVOLVED

*The False Claims Act.*

31 U.S.C. Sections 231, 232 (A)(B)(C) (E), 233, 234 and 235.

*The United States Shipping Act of 1916.*

46 U.S.C. Section 802.

The foregoing statutory sections are set forth in the Appendix at A.16.

## STATEMENT OF THE CASE

Petitioner — Relator Dorothy S. Greenberg ("Relator") filed this action in the federal district court for the Southern District of New York pursuant to the False Claims Act [31 U.S.C. §232 (A), (C)] on September 30, 1976, on behalf of and in the name of the United States of America (the "Government"). She sought to recover damages and penalties for the Government on the grounds that it was fraudulently induced to pay out to dummy U.S. corporations controlled by Burmah Oil Company Limited ("Burmah") "in excess of $60,000,000" in ship construction subsidies granted by the Maritime Administration on the basis of false applications made by the dummy corporations in purported compliance with the Titles V and XI of the Merchant Marine Act of 1936 (46 U.S.C. §§ 1101 *et seq.*). (A.44). Section 232(A) of the False Claims Act vested the federal district court for the Southern District of New York with "full power and jurisdiction to hear, try and determine such suit," since substantially all of the respondents were found within the jurisdiction of the Southern District of New York. (A.17). The Petitioner alleged that "all the documents and



information" as listed on Schedule A to the Complaint were "not in the possession of the United States, the Attorney General thereof or any of its agencies or instrumentalities." (A.25).

In accordance with the False Claims Act, on September 30, 1976, Relator caused the verified complaint to be served on the United States Attorney for the Southern District of New York and a copy of the complaint accompanied by ten documents (or sets thereof), amassed by the Relator and listed on Schedule A to the complaint, to be transmitted, certified mail, to the Attorney General of the United States in Washington, D.C. (A.122).[1]

On December 2, 1976, the sixty-third day after the action was filed, the Government, by motion papers dated December 1, 1976 and entitled "Notice of Special Appearance and Motion to Dismiss", moved, purportedly pursuant to Section 232(C) of the False Claims Act [31 U.S.C. §232(C)] to dismiss for lack of jurisdiction, claiming that Relator's action "was based upon evidence or information in the possession of the United States . . . at the time . . . suit was brought."[2] (A.122).

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[1]This procedure is mandated by Section 232(C) of the False Claims Act, 31 U.S.C. §232(C). Schedule A to the Complaint is entitled:

> "STATEMENT OF DISCLOSURE ON BEHALF OF DOROTHY S. GREENBERG PURSUANT TO SECTION 232 (C) OF TITLE 31 OF THE UNITED STATES CODE", (A. 52);

and lists ten documents or sets thereof. These documents are sometimes herein referred to collectively as the "ten documents."

[2]Thirty-three of the thirty-five named respondents, all appearing by counsel, also moved to dismiss without supporting papers by a single Notice of Motion, dated December 6, 1976, relying on the Government's papers. The respondents had not answered, their time to move or answer having been extended to December 6, 1976 informally by correspondence.

The False Claims Act contains no express provision authorizing a special appearance. Nor do the Federal Rules of Civil Procedure. 5 Wright and Miller, *Federal Practice and Procedure, Civil* §1344 (1969).

*The Information Furnished the Government on September 30, 1976, by Relator.*

In addition to the Complaint, an original document outlining the details of the allegedly fraudulent transactions, Relator on September 30, 1976, sent to the Department of Justice the following documents and compilations:

1. An undated internal memorandum from the files of Burmah;

2. A Memorandum dated May 12, 1975 from Richard Kurrus ("Kurrus") to John J. McMullen ("McMullen") (A.55);

3. A second memorandum dated August 21, 1975 from Kurrus to McMullen;

4. A 63-page Memorandum of Law dated September 16, 1975, authored by the firm of Kurrus and Jacobi, Esqs.;

5. Two complaints prepared for and on behalf of Burmah for actions in the Supreme Court of the State of New York ["5(a)" and "5(b)" to Schedule A];

6. A folder of news releases[3] consisting of some 66 pages;

7. A Memorandum of Law relating to the self-dealing of respondent Elias J. Kulukundis ("Kulukundis"), Burmah's former Chief Executive Officer, authored by the law firm of Seymour & Patten, Esqs. (A. ); and

8. Two memoranda of interviews dated July 28, 1975 and November 14, 1975 with Kulukundis ["8(a)" and "8(b)" to Schedule A] (A.80, A.89).

[3]The news and magazine articles covered a range of subjects including Burmah's financial problems; Burmah's interest in the respondent Burmast East Shipping Corporation; cost overruns in connection with the construction of the LNG tankers involved in the fraud outlined by the Relator, etc.



Item 2 above, a highly material document conceded below to not be in the physical possession of the Government at the time of suit, is the full text of a three-page single-spaced internal confidential memorandum, dated May 12, 1975, from Richard W. Kurrus, attorney for the respondent Burmah, to its then Chief Executive Officer, Dr. John J. McMullen. (A.55) That document (referred to herein as the "Kurrus Memorandum") purports to memorialize the events occurring at two meetings between representatives of Burmah and MarAd,[4] on May 8, 1975, in which Burmah's attorney Mr. Kurrus participated and at which the fraudulent applications for ship construction subsidies and federal loan guarantees were discussed. One of the representatives present for MarAd was Robert J. Blackwell, "Maritime Administrator, Assistant Secretary of Commerce for Maritime Affairs." (A.55).

The Government contended that all of the information contained in the foregoing documents was in possession of the Government prior to September 30, 1976. In so arguing it relied on the fact that some of the information, but not all, was in the possession of (i) MarAd; (ii) Congressman Les Aspin; (iii) the Department of Justice; (iv) the Securities and Exchange Commissions; (v) the House Committee on Government Operations; and (vi) the General Accounting Office. It is undisputed that not one of the foregoing had assembled or analyzed all the information prior to September 30th; far less, had they everything (A.112-114).

[4]The Maritime Administration, sometimes herein, and in the Appendix, referred to as MarAd, is an agency in the Department of Commerce. It has the responsibility for passing upon applications for ship construction subsidies and loan guarantees under Titles V and XI of the Merchant Marine Act of 1936, *supra*. (A. 100-102).

**MarAd**

Relator contends (and so contended below) that MarAd was so intimately involved in the alleged fraud that its knowledge could not be imputed to the Government.

As to MarAd's alleged knowledge, the Government submitted an affidavit from MarAd's General Counsel, Samuel B. Nemirow. (A.100).[5] The Government contended below that MarAd was informed in 1975 of the underlying factual allegations upon which the Relator's Complaint was based and that "Relator has not presented any substantive information not known to MarAd prior to September 30, 1976." (A.101). However, MarAd did not have the Kurrus Memorandum. (A.112-114). Nor did it have Items 1, 3, 7, 8(a) and (b) of Schedule A. (*Ibid*). Nor had MarAd taken any action, even though Burmah itself was alleged to have notified MarAd of the underlying facts. (A.109-111).

MarAd claimed that it received the two New York Supreme Court complaints, documents 5(a) and 5(b) of Schedule A. (A.113). MarAd further claimed that it was aware of most of the newspaper and magazine articles, Item 6 of Schedule A (A.112-113). While MarAd concededly did not have in its physical possession the 63-page Memorandum of Law, authored in September, 1975 by the Kurrus law firm, its General Counsel claimed to have been "shown" it some time in September 1975. (A.111). As to whether he read or reviewed it, is not stated. (A.111).

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[5]Attorney Nemirow attended the first of two meetings memorialized by the Kurrus Memorandum. (A ). He did not attend the lunch later that day at which Administrator Blackwell is said to have acknowledged the fiction surrounding the transactions and to have urged that there be no public airing of the issues. (A. 58-59). The Government submitted no affidavit from Mr. Blackwell.



As to the Kurrus Memorandum, the Government argued that since it involved meetings with personnel of MarAd, MarAd had to have known what it contained. (A.113-114).

Elliott Richardson, then Secretary of Commerce, admitted, however, on November 17, 1976 that most of Relator's documents came to the attention of MarAd for the first time as a result of this action. See pages 11-12, *infra*.

**Congressman Les Aspin**

On May 25, 1976, Congressman Les Aspin (of Wisconsin) reported to the House that on March 3, 1976, he had written to Mr. Robert J. Blackwell, inquiring as to the propriety of MarAd's proposed financing of five ships for the use and transport of LNG from Indonesia to Japan.[6] Congressman Aspin told the House that the response from Mr. Blackwell, under date of April 21, 1976 "was totally unsatisfactory." *Congressional Record* — House, May 25, 1976, page 4909.

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[6]Burmah (through subsidiaries) entered into a Transportation Agreement on September 28, 1973 with an Indonesian state-owned company to carry LNG from Indonesia to Japan (the "Pertamina Transaction"). Companies known as the "Cherokee Companies" were allegedly set up in the United States by Burmah in order to secure U.S. financing for construction of the vessels necessary to fulfill the agreement. (See Complaint, ¶35, A. 42).

The Pertamina Transaction has been totally recast since the filing of the complaint. As recast, the respondent General Dynamics Corp. on January 19, 1977 received from MarAd a $727 million loan guarantee for the purpose of constructing five to seven ships to convey LNG between Indonesia and Japan. The grant of these guarantees in January 1977 to say the least has been controversial. See *The New York Times* of January 31, 1977, p. 20, the editorial "Of Ships and Contracts, with Envy?" Janeway, "Lame Duck Legacy Left by Richardson", *The Washington Star* of January 30, 1977; "The Outrageous General Dynamics Loan Guarantee" (Remarks of Senator Proxmire) in *The Congressional Record*, S.2207-08 (Feb. 3, 1977).

Congressman Aspin inserted into the Record that correspondence of March 3rd and April 21st, as well as a letter he had written under date of May 25, 1976, to Congressman Jack Brooks. Chairman of the House Committee on Government Operations.

On August 19, 1976, Congressman Aspin, presumably having had no satisfactory response from MarAd, wrote to then Attorney General Edward Levi, complaining of the matter, forwarding to the Justice Department an article from the New York Times of August 19th and his correspondence with Robert Blackwell, writing:

> Today the *New York Times* reported that several agencies are investigating the application of the Burmah Oil Company for Title XI mortgage insurance guarantees for the construction of 8 LNG tankers at General Dynamics, Quincy, Mass. facility.
>
> According to the *New York Times*, a memorandum of law prepared by a firm acting for one of Burmah's subsidiaries flatly states that affidavits of corporate citizenship submitted to the Maritime Administration "were fraudulent."
>
> If this information is accurate, it surely constitutes prima facie evidence that some parties may be involved in an effort to obtain Title XI guarantees through fraud.
>
> I am writing to you today to request that the Department of Justice undertake an *immediate investigation* of any possible fraud in connection with this case. It is obvious that we cannot tolerate anyone under any circumstances providing the Maritime Administration with fraudulent information. [emphasis ours].[7]

[7]The letter from Congressman Aspin was referred to by the Department of Justice but not produced.



Some forty-eight days later, under date of October 7, 1976, Assistant Attorney General Thornburgh, acknowledged the Congressman's letter. He wrote, in part, as follows:

> You specifically mention and request investigaiton of possible fraud in the submission of affidavits of corporate citizenship to the Federal Maritime Administration in order to obtain the Title XI guarantees. In this connection we understand both the Administration and the Securities and Exchange Commission are inquiring into this matter. I am, therefore, communicating with both of these agencies requesting all pertinent information. Upon receipt of that data, a determination will be made as to what further action would be appropriate by the Department.

The Relator's data, however, had already been received on October 4th, by the Department of Justice; and neither MarAd nor the Securities and Exchange Commission had all of Relator's data; nor had either agency made public or communicated to the Department of Justice, any findings.

Congressman Aspin, presumably not having had a response to his August 19 letter from the Justice Department, wrote under date of October 2nd, complaining of the matter to Secretary of Commerce Richardson. Secretary Richardson responded at length on November 17, 1976, and in part referred to the pendency of this action (filed some 48 days before), as follows:

> As you may be aware, the forfeiture contention is currently the subject of civil litigation in federal district court in New York. *In this civil action, most* of the documents which have been the basis for media reports, such as *The New York Times* article of August

> 19, *have been brought to light* and as a consequence, MarAd has recently been able to review these documents — *most of them for the first time.* Nothing in them, including the "legal memorandum" by Richard Kurrus, would lead MarAd to change its belief that the LNG vessels are not subject to forfeiture. [emphasis ours].[8]

Thus Secretary Richardson conceded that certain of Relator's documents had never before come to the attention of MarAd and that as a consequence of Relator's action MarAd "has recently been able to review" them, and "most of them for the first time."[9]

**The Department of Justice**

The Department of Justice prior to September 30, 1976 had only (i) Congressman Aspin's remarks in the Congressional Record and (ii) the *New York Times* article of August 19th, presumably obtained as a result of the Congressman's letter of August 19th (A.11).

The letter of Assistant Attorney General Thornburgh to Congressman Aspin of October 7th establishes that as of that date the Department of Justice was relying upon MarAd's and the SEC's inquiries into the matter and is an admission that it

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[8]The "legal memorandum" was item 4 to Schedule A of Relator's complaint.

[9]Secretary Richardson's admission contradicts the sworn affidavit of Samual B. Nemirow, General Counsel of MarAd. (A. 111-114).



had not prior thereto commenced an investigation. See page 11, *supra*.

Of course on October 4th, the Department of Justice had received Relator's complaint and the ten documents, mailed on September 30th. But the SEC had none of these documents. (A.124-128).

Under date of April 9, 1975, Deputy Assistant Attorney General Leon Ulman in the Office of Legal Counsel of the Department of Justice, had sent a "Memorandum" to Dudley Chapman, Associate Counsel at the White House. When he submitted that Memorandum he had none of the documents which Relator furnished or which the Government claimed to have in its possession prior to September 30, 1976. And of course he did not have the Kurrus Memorandum.

**The Securities and Exchange Commission**

The Commission "had none of the material information" prior to September 30, 1976. (A.11). A staff member of the Commission, on October 18, 1976, after the filing of this action, requested Relator's counsel to furnish the Commission copies of the documents listed on Schedule A. That request was referred by Relator to the Department of Justice. (A.126-7).

On September 8, 1976, the Commission had issued an order directing a private investigation "In the Matter of Burmah Oil Company, Ltd." and on September 24 and 27, 1976 issued *subpoenae duces tecum* to various individuals and corporations. The "acts or practices" allegedly being investigated

> . . . concern Burmah's relationship to various persons and entities including Energy Transportation Corporation and certain of its subsidiaries, involved in financing and chartering certain vessels to be used in the transport of LNG.

But it had not yet received any documents. It is a fair inference that the SEC received the Complaint and the documents listed on Schedule A thereof as a result of the filing of this action. (A.126-7).

**The House Committee on Government Operations [The "Brooks Committee"] (A.119-120)**

In a response dated November 29, 1976 to a letter dated October 22, 1976 of inquiry from the Department of Justice, sent after the filing of this action, the Brooks Committee had in its possession five of the ten documents, namely those listed as numbers 1, 3, 4, 5(a) and 5(b) on Relator's Schedule A. It did not have the Kurrus Memorandum nor items 6, 7, 8(a) and (b) of Schedule A. (A.119-120).

On August 2nd, the Brooks Committee asked the General Accounting Office to review certain of the issues. On August 3rd, Chairman Brooks inquired of Administrator Blackwell as to certain aspects of the Pertamina transaction. See page 9, m.6, *supra*.

In June 1976 and subsequent thereto but prior to September 30th, staff members of the Brooks Committee allegedly met with officials of MarAd "on at least 5 occasions." (A.115).

But by August, the Brooks Committee had still not made a determination. In a News Release it stated

> The House Committee on Government Operations has received certain allegations concerning the General Dynamics Liquified natural gas tanker program, and has had some discussions about them with the Maritime Administration, Congressman Jack Brooks (D-Tex.), Chairman of the Committee, said today.
>
> 'On the basis of these discussions, it has not yet been determined whether there is need for further committee action,' Brooks said.
>
> The Committee has requested further information from the Maritime Administration and has asked the General Accounting Office to review the entire ship construction loan guarantee program as it is presently being operated. The committee is awaiting responses to these requests.
>
> Copies of the letters to the Maritime Administration and General Accounting Office are attached.



**The General Accounting Office ("GAO")**

This office did not have the Kurrus Memorandum.

While Attorney General Thornburgh referred in his October 7th letter to this agency, the Government did not contend below that that agency had any of the information supplied by Relator. MarAd did apparently turn over to the GAO its records involving the Easco (A.31) and Pertamina Transactions (A.115), but not any of the Relator's documents.

**The New York Times Article of August 19, 1976 (A.59).**

This article was sent to the Department of Justice by Congressman Aspin on August 19, 1976. It was also contained in Item 6 to Schedule A of the complaint. This article appeared on the front page of the *Times* under the headline

"BURMAH OIL'S AID BID STUDIED FOR POSSIBLE FRAUD"

The article quotes Robert J. Blackwell as stating that his agency, MarAd,

> 'has no information to indicate that there was fraud of any type or wrongdoing' in the Burmah applications.[10]

On page 60 of the *Times*, the article is continued. In the second column the following is reported:

> Internal corporate documents from Burmah and confidential memoranda obtained by the New York Times pertaining to Burmah's situation show that serious questions over the legality of the guarantees and subsidies were raised by lawyers 11 months ago.
>
> One memorandum prepared by the firm of Kurrus & Jacobi, says: 'The continued involvement of those companies in the ship construction contracts will create a cloud on the title of the vessels and could subject them to forfeiture to the United States.' Some $476 million is involved in these contracts alone.
>
> The memorandum, dated September 16, 1975, said the financing arrangements 'present some extremely perilous legal problems for Burmah.' It suggested that 'forfeiture of the vessels to the United States would obviously have devastating consequences.' (A.63-4).[11]

The *Times* article then discusses the Kurrus Memorandum:

> Other documents obtained by The Times indicate that officials of the Maritime Administration may have been aware that violations of Federal law might

[10]The Kurrus Memorandum contradicts.

[11]The reference is to the 63 page Memorandum of Law, item 4 to Schedule A of Relator's complaint.



> have been committed in connection with the Burmah guarantees and subsidies.
>
> In a memorandum to John J. McMullen, former president of Burmah Oil Tankers, Richard Kurrus of the Washington law firm reported that he had engaged in a conversation about Burmah on May 8, 1975, with Mr. Blackwell, the Assistant Secretary of Commerce, and Samuel Nemirow, assistant general counsel of the Maritime Administration.
>
> Mr. Kurrus reported that he met with Mr. Blackwell for lunch later the same day and Mr. Blackwell said he felt that Elias J. Kulukundis [sic], an earlier president of Burmah Oil Tankers, 'may have acted imprudently and perhaps even improperly in the deals he set up.'
>
> Mr. Kurrus quoted Mr. Blackwell as saying that he was aware that problems had arisen over the Title XI financing and that 'everyone recognized' that the formal arrangement approved by the Maritime Administration 'was based on friction [sic].'
>
> Asked about this, Mr. Blackwell acknowledged he had met with Mr. Kurrus on May 9, not May 8, 1975, and that they had discussed Burmah's problems. However, he flatly denied that he ever said that the financing arrangements had been 'based on fictions.' (A.64-5)

There are no further quotations from the three-page Kurrus Memorandum. The remaining reference in the Time article to the Kurrus Memorandum was —

> Mr. Kurrus expressed shock yesterday when informed that a copy of his memorandum had been obtained by the Times. When asked if he wanted it read back to him, he replied, 'Don't read it. I don't want to be trapped. That's too dangerous.' (A.65)

**What the Government Did Not Know**

Nowhere in the moving affidavits submitted by the Government was it even suggested that prior to September 30, 1976, the Government was aware of the alleged complicity of MarAd and that Administrator Blackwell of that agency

> . . . recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy. [Kurrus Memorandum, A.59].

On September 30, 1976, neither the Department of Justice, the Securities and Exchange Commission, the General Accounting Office, nor any other investigative or prosecutorial agency of the Executive Branch of the Government had Relator's documents, except for the August 19th *New York Times* article.

**Disposition of the Relator's Action**

The District Court entered an Order and Final Judgment, dated January 6, 1977 and entered January 10, 1977 (A.15), in accordance with its unreported Memorandum Opinion dated December 22, 1976, (A.10) dismissing the Relator's *qui tam* action on jurisdictional grounds. The Court's basis for the dismissal was its interpretation of Section 232 (C) of the False Claims Act [31 U.S.C. §232(C)] and its conclusion that Relator's action was "based upon evidence or information in the possession of the United States, or an[y] agency, officer or employee thereof, at the time such suit was brought." *Ibid.* (A.11).

In its Memorandum Opinion of December 22, 1976, the District Court found that all *but one* of the ten documents submitted by Relator to the Government were, prior to September 30, 1976, in possession of the Government — either the Maritime Administration,[12] the House of Representatives' Committee on Government Operations, or the Department of Justice. In making its determination, the District Court adopted one position of Relator urged below, to the effect that because of the alleged complicity of MarAd, knowledge and information in MarAd's possession may not be imputed to the Government. (A.12). Nonetheless, the Court found that all of the substantive evidence or information presented by Relator was in possession of other agencies of the Government, including a Congressional Committee, prior to the filing of this action and the Court therefore dismissed for lack of jurisdiction. (A.12).



With regard to the Kurrus Memorandum, Judge Knapp found as follows:

> The one new document which the relator claims to have brought to the Government's attention is a memo-

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[12]The Court found that:

> The Maritime Administration had all of the information except for the Kurrus Memorandum. The Administration had obtained certain information relating to possible self-dealing by Elias J. Kulukundis from a complaint filed in New York State Supreme Court rather than the documents subsequently supplied by the relator. The House Committee on Government Operations had substantially the same information as the Maritime Administration. The Committee did not, however, have the folder of newspaper clippings compiled by the relator.
>
> The Securities and Exchange Commission had none of the material information. The Department of Justice had only the *New York Times* articles and Congressman Aspin's remarks in the *Congressional Record*. [A. 11].

Respondent Kulukundis was the former Chief Executive Officer of Respondent Burmah and was the immediate predecessor of John J. McMullen, the original recipient of the Kurrus Memorandum. (A. 55).

randum by a lawyer named Richard Kurrus from which it might be inferred that certain officials of the Maritime Administration knew about the alleged fraud, and perhaps that they were condoning it. The relator argues that this memorandum in itself constitutes substantial information and also that it warrants our concluding that the Maritime Administration was sufficiently involved in the scandal so that we should disregard any documents or information it possessed in making our determination. [A.12].

As for the claim that the Kurrus Memorandum constitutes substantial information, we so assume for present purposes. We note, however, that it was specifically identified and fully described in an August *New York Times* article. As a result, the information it contained was public knowledge. A copy of the article was in the files of the Justice Department. The information was therefore in the Department's possession and the memorandum itself would inevitably have been acquired by the Department in the course of its investigation had it been considered important. [A.12].[13]

As shown under Reason I, *infra*, the Kurrus Memorandum was not "fully described" in the *New York Times* article. Further, as of September 30, 1976 (i) there had been no public legal proceeding or action instituted by the United States, or

[13]In its brief in support of its Motion to Dismiss below, the Government argued and conceded that: "There are . . . only 4 documents submitted by Relator that the United States did not have in its possession prior to commencement of this action . . . The first of these, item 2 on Schedule A, is a three-page memorandum dated May 12, 1975, from Richard Kurrus to John J. McMullen . . . (the 'Kurrus Memorandum').

• • • •

The remaining three documents, items 7, 8(a) and 8(b), are a memorandum of law concerning alleged self-dealing of Elias Kulukundis and memoranda of conversations with Elias Kulukundis and N.J.D. William, an official of Burmah." Government's Memorandum of Law in Support of . . . Motion to Dismiss, dated December 2, 1976, pp. 16-17. See also Nemirow Affidavit ¶¶35, 36. (A. 113-114).



any agency thereof, arising out of the alleged facts contained in Relator's complaint; (ii) there had been no indictments or grand jury proceedings; and (iii) there had been no Congressional hearings, in public or private session, or Congressional investigation, other than preliminary Congressional inquiries.

The Government contended however in oral argument before the District Court on December 10, 1976, the return day of the motion, and subsequently in a post-argument reply affidavit, that the Department of Justice was then currently conducting an investigation. If so, this Department of Justice investigation was commenced after Relator's suit was instituted on September 30, 1976.

The United States Court of Appeals for the Second Circuit affirmed the District Court's dismissal of the Relator's suit on jurisdictional grounds and held in a *per curiam* opinion that that Judge Knapp's finding that the information supplied by the Relator was in the possession of the United States Government was "amply supported by the record." (A.6). The Second Circuit indicated that the fact that the Government did not have physical possession of all of the documents supplied by the Relator was not significant since: "The Government's possession of the material information contained in the Memorandum is enough under the statute to divest the Court of jurisdiction." (A.6)

As to the information disclosed by the Relator in the materials delivered to the United States Attorney for the Southern District of New York, the Second Circuit was of the opinion that: "Here, no new information concerning either the existence or the nature of the fraud was disclosed as a result of Relator's efforts." (A.6). The Relator's timely application for re-

hearing and rehearing en banc was denied on July 1, 1977. (A.9).

The carefully documented, thoroughly investigated complaint in this action presents a complex set of factual allegations[14] raising novel issues of law never before squarely presented for judicial determination. At its heart is an allegedly massive fraud perpetrated by subterfuge on the Government in connection with applications for loan subsidies and guarantees obtained by the principal respondents under Titles V and XI of the Merchant Marine Act of 1936 (46 U.S.C. §§1101, *et seq.*) and the United States Shipping Act of 1916, as amended (46 U.S.C. §801, *et seq.*). (A.121-128).

## REASONS FOR GRANTING THE WRIT

### I.

THE ERRONEOUS APPLICATION OF THE JURISDICTIONAL PROVISIONS OF THE FALSE CLAIMS ACT BY THE COURTS BELOW SHOULD NOT BE ALLOWED TO PREVENT A THOROUGH JUDICIAL EXAMINATION OF A MAJOR FRAUD BEING PERPETRATED UPON THE UNITED STATES GOVERNMENT BY A FOREIGN CORPORATION WHICH HAS AVAILED ITSELF OF UNITED STATES FINANCING FOR SHIP CONSTRUCTION PURPOSES, CONTRARY TO THE MERCHANT MARINE ACT OF 1936, BY ORGANIZING DUMMY CORPORATIONS IN THE UNITED STATES WHICH HAVE APPLIED FOR AND

[14]The present proceeding involves an order of dismissal and accordingly the allegations of the complaint must be accepted as true. *Carr v. Learner*, 547 F.2d 135 (2d Cir. 1976). 5 Wright and Miller, *Federal Practice and Procedure, Civil* §1350, pp. 551-553 (1969).



SECURED CONSTRUCTION DIFFERENTIAL SUBSIDIES AND FEDERAL GUARANTEES OF DEBT OBLIGATIONS THAT ARE ONLY AVAILABLE TO U.S. CITIZENS.

**A. The Kurrus Memorandum was not "fully described" in the New York Times August 19 article, and accordingly the dismissal for lack of jurisdiction was clearly erroneous.**

The Government had *The New York Times* article. It did not have the Kurrus Memorandum. *The New York Times* abridgment (A.59) and the full text of the Kurrus Memorandum (A.55) speak for themselves. The District Court's conclusion based on its comparison of the two documents, that the three-page, single-spaced Kurrus Memorandum was "fully described" in the *Times* article and the Second Circuit's affirmation thereof were clearly erroneous. (A.12).

The Kurrus Memorandum was indeed identified in the *Times* article, but only two of that document's important points were quoted — that Mr. Kulukundis "may have acted imprudently and . . . improperly" and that the arrangement approved by MarAd "was based on friction" [sic]. Furthermore, these points were taken out of context, so that their complete meaning was not apparent.

Highly material disclosures of factual matters contained in the Kurrus Memorandum were not reported by the *Times*. The principal omission is Blackwell's suggestion that Burmah engage in a cover up, i.e. Blackwell "warned about a full fledged legal controversy between Burmah and Energy," which would lead to exposure of wrongdoing. A.59).[15]

[15]The article also omitted the alleged admission of Mr. Blackwell ". . . that there appears to be several things basically wrong with the overall structure of this deal . . ." (A. 59).

In short, the Kurrus Memorandum contains admissions by Burmah through its counsel of the alleged fraud that were not reported by the *Times*. ***Without the Kurrus Memorandum there was no documentary evidence of MarAd's complicity!*** See Paragraph "38" of the Complaint. (A.44-5).

The relevant portion of the Kurrus Memorandum, dealing with the second of two meetings, is as follows: [only the italicized words were quoted in the *Times* article].

> I met with Mr. Blackwell for lunch on the same day. We had a further discussion of the Burmah-Energy problem. I explained to Mr. Blackwell that we could understand the function of the Energy companies under the Title XI insurance financing, but that the role of the Energy companies beyond that was impossible for us to understand or justify. Mr. Shelby, as I understand it, came into this deal as a lawyer representing Burmah. He and Messrs. Chen and Cuneo have put together the Energy companies and their subsidiaries in order to meet the legal requirements of United States ownership and control of (a) the company having the bareboat charter from the owner-lessor, under the leverage lease arrangement and (b) the company holding temporarily the shipbuilding contracts until permanent financing on the Cherokee I-V vessels can be arranged.
>
> People having the substantial interest in a project which Messrs. Shelby, Chen and Cuneo claim usually provide something of substance. Either they have been finders, they have invented something or devised the project, put together the financing under difficult circumstances or brought the indespensible [sic] parties to the deal together. Messrs. Shelby, Chen and Cuneo appear to have done none of these



> things. They rather appear to us to be capitalizing on their special position under the Title XI financing and taking this further to create a vested equity interest in the deal that cannot be justified. I explained to Blackwell that we could not at this time understand the consideration for any commitment to Messrs. Shelby, Chen and Cuneo beyond the Title XI financing arrangements and that the primary purpose of a meeting with them would be to afford them an opportunity to explain what consideration, if any, on their part did exist.
>
> I also explained that we had some serious problems concerning actions that Messrs. Shelby, Cuneo and Chen were taking that appeared to be in conflict with Burmah's interest. In this respect, I pointed out that they seem to have a continuing business association with Mr. Elias Kulukundis. Furthermore, Messrs. Shelby, Cuneo and Chen are now pursuing, according to our information their own private LNG project or projects which involve General Dynamics, Pertamina and possibly other companies who are integral and essential parts of the Burmah project. I emphasized that we do not have all of the facts but that if the Energy people are acting in the ways that we have heard, they would be in our opinion violating legal obligations which they owe to Burmah and would be acting improperly and illegally by interfering with Burmah's business relationships to which they have been introduced while they were ostensibly acting on Burmah's behalf.
>
> I also pointed out that this was not a situation where the Energy people had supplied any significant capital investment on their own. All expenses, costs and fees have been paid by Burmah. Under these circumstances, Burmah we

feel has a legal right to prevent the Energy people from assuming any larger or different role than their involvement as a conduit in the Title XI financing arrangement contemplated.

Mr. Blackwell stated that he could appreciate this problem but that it was obviously not Marad's problem. He said that he felt that Mr. Kulukundis *may have acted imprudently and perhaps even improperly in the deals he set up*, but that Burmah had permitted him to operate, had given him a cover of authority and had perhaps even countenanced the deals.

I explained that the real problem [sic] *vis a vis* the Energy people arose because of the special legal problems concerning the Title XI financing and that *everyone recognized* that the structure that Marad had approved in this deal (and in other similar deals such as Maritime Fruit Carriers, Ultamar, Shell, A. J. Chandris, etc.) *was based on a fiction*. He said that he recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy.

I explained that we obviously were not interested in provoking such a legal battle if it could reasonably be avoided, but the way that this deal is presently structured is an unviable and impossible situation for Burmah. If we cave in to the Energy people, we would in a real way be submitting to blackmail. Furthermore, there is a valid argument I believe that the Energy people would be permitted to profit unduly and unconscionably through a United States Government contract.



Mr. Blackwell admitted that there appears to be several things basically wrong with the overall structure of this deal that should be rectified if possible. He agreed that Burmah must take its own actions to place this deal on a sound legal as well as economically feasible basis. I asked him to bear with us in attempting to work out these problems and stated that we would keep him informed of developments. [A.55-58]

Hence, the District Court's findings that the Kurrus Memorandum was "fully described" in the *Times* article and therefore "public knowledge" and that its contents constituted substantive evidence in possession of the Government prior to September 30, 1976, were clearly erroneous, and should not have been affirmed by the Second Circuit. Without such an erroneous finding, Relator could not have been denied jurisdiction to prosecute her claims. *United States v. Rippetoe*, 173 F.2d 735 (4th Cir. 1949); *United States et rel. Vance v. Westinghouse Electric Corp.*, 363 F.Supp. 1038 (W.D. PA. 1973).

Judge Knapp assumed in his opinion that the Kurrus Memorandum constituted substantial new information contributed by Relator which was not in the possession of the Government at the time Relator filed suit. (A.12). This assumption and the District Court's finding that the Kurrus Memorandum contained information "... from which it might be inferred that certain officials of the Maritime Administration knew about the alleged fraud, and perhaps that they were condoning it," (A.12) precluded, as a matter of law, dismissal for failure to meet the jurisdictional requirements. This finding is even more incomprehensible in the light of the District Court's other finding that evidence of MarAd's complicity in the alleged fraud indicated in the Kurrus Memorandum is not "information in the

possession of the Government."[16] The finding that the Government did not possess the Kurrus Memorandum at the time the suit was filed required the District Court to deny the motion to dismiss.

In its *per curiam* opinion affirming the decision of the District Court below, the Second Circuit held that: "The Government's possession of the material information contained in the Memorandum is enough under the statute to divest the Court of jurisdiction." (A.6) The Second Circuit was of the opinion that the Relator supplied "... no new information concerning either the existence or the nature of the fraud . . ." (A.6), and went on to indicate in a footnote that although the Kurrus Memorandum revealed the complicity of the Maritime Administration in the alleged fraud, that nonetheless this information was clearly disclosed in the New York Times article (A.6-7). The Second Circuit's comparison of the information contained in the *New York Times* article and in the Kurrus Memorandum is overly simplistic and wholly inaccurate. The *Times*' allegation that MarAd officials "may have been aware of the fraudulent scheme" can hardly be equated in terms of significance with the detailed revelation of complicity contained in the memorandum itself:

He [Blackwell] said that he recognized the weakness in

[16]The District Court also erroneously found that MarAd was in possession of Items 7, 8(a) and 8(b) to Schedule A. (A. 11 n. 1). The Government conceded that MarAd was not in possession of these documents on September 30, 1976. Nemirow affidavit, ¶35 (A. 113). These documents substantiate the problems Burmah was having with its former chief executive officer, Kulukundis, and his alleged disloyalty to Burmah, which are also alluded to in the Kurrus Memorandum (A. 69 to A. 100).



the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy.

* * *

Mr. Blackwell admitted that there appears to be several things basically wrong with the overall structure of this deal that should be rectified if possible [A.59].

The Government did not possess the Kurrus Memorandum at the time Relator filed suit and hence the findings of the Courts below that the Government possessed all of the "evidence or information" upon which the Relator's suit was based were clearly erroneous. The jurisdictional barrier posed by Section 232(C) of the False Claims Act should not have been erected in the present proceeding.

Indeed as to items 7, 8(a) and 8(b) which the Relator provided and which were admittedly not in the Government's possession (A.113) the Second Circuit held in a footnote to its opinion that these documents were of little or no relevance to the alleged fraud. (A.6-7) One can only wonder how a legal ruling as to the relevance or materiality of a particular document could be made when there had been no discovery by which to develop the facts underlying the allegedly fraudulent scheme. To assert that certain of the documents the Relator provided were irrelevant when only affidavits and motions were before the District Court, was utterly premature. The ramifications and significance of the allegedly fradulent scheme could not be calculated or measured until discovery had been had by all interested parties and the known facts had been aired and examined at a judicial hearing. Unfortunately, the ramifications of the fraudulent scheme alleged by the Relator will re-

main unexplored and unknown because of the erroneous invocation of the jurisdictional provisions of the False Claims Act by the courts below.

## II.

## THE JURISDICTIONAL PROVISIONS OF THE FALSE CLAIMS ACT SHOULD NOT BE INTERPRETED AND APPLIED IN A MANNER WHICH BARS ACCESS TO THE FEDERAL COURTS BY A PRIVATE CITIZEN HAVING POSSESSION OF MATERIAL DOCUMENTS AND INFORMATION EVIDENCING THE PERPETRATION OF A MAJOR FRAUD AGAINST THE UNITED STATES GOVERNMENT.

A. The Second Circuit's interpretation of section 232(C) of the False Claims Act and its application thereof to the present action sound a death knell for the *Qui Tam* Action.

The Government did *not* establish, as is required by Section 232(C) of the Act, as a prerequisite to dismissal, that it was in possession of *all "evidence or information"* submitted by Relator. Nor could it. The Government's moving papers, on the contrary, reveal *that the Government did not have all the substantive information, did not have all the documents, and did not have all the evidence.* What it did have was not organized or assembled and was scattered throughout the "vastness" of the Washington federal establishment. *Cf. Bateson-Stolte, Inc. v. The United States,* 305 F.2d 386 at 388 (Ct. of Claims 1962).

To be sure, certain of the information was buried in the archives of various federal agencies. It was, however, disorganized and not analyzed nor integrated — an all too familiar problem. Congressman Aspin had been repeatedly frustrated



by MarAd's "unsatisfactory" replies to his inquiries, a task made far more onerous by that agency's obvious desire to cover up its own complicity. (A.59). Even the Department of Justice moved slowly until after the filing of this action. Only after Relator's Complaint and the ten documents were filed with the Justice Department did it take action, prompted by the fact that it was then faced with a statutory duty to respond within sixty days. 31 U.S.C. §232(C).[17] The complex facts disclosed by Relator's Complaint had not previously been accessible to any one agency of the Government. These facts are like a jigsaw puzzle composed of many pieces, with missing parts. Relator took these pieces, laboriously added the missing pieces, and in her complaint portrayed a clear picture which had not been seen or examined before by a disinterested agency of the Government.

Significantly, the fact that the Government did not possess the Kurrus memorandum has remained unchallenged throughout the proceedings below. Yet, the District Court and apparently the Second Circuit were of the opinion that the material information in the Kurrus memorandum was "fully described" (A.12) in *The New York Times* article of August 19, 1976, and hence that the Relator failed to provide the Government with any new or significant information when it provided the Government with the Kurrus Memorandum (A.6).

*The New York Times* article simply asserts that "Officials of the Maritime Administration may have been aware that violations of Federal law might have been committed in connection with the Burmah guarantees and subsidies." (A.64)

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[17]It actually responded on the sixty-third day. Query: Why hadn't the Justice Department moved earlier?

The presence of the *Times* article in the files of the Justice Department can hardly be equated with possession of the significant information contained in the Kurrus Memorandum which was admittedly not in the Justice Department's files at the time the Relator filed her suit. Before a federal district court can be divested of jurisdiction, under the False Claims Act, Section 232 (C) it must be made to appear that such suit was based upon "[E]vidence or information in the *possession* of the United States or any agency, officer or employee thereof, at the time such suit was brought". (Emphasis added) The fact that the Justice Department's files contained a newspaper article alleging possible awareness on the part of certain MarAd officials of the alleged fraud does not justify nor does it lead *a fortiori* to the conclusion that the Government was in possession of all significant and specific factual information concerning the fraud and the extent of MarAd's complicity therein.

Daily newspapers throughout the United States are filled with stories about alleged schemes, plots, scandals and swindles involving the Government or Government officials. The retention by the Justice Department or any Governmental agency of each and every newspaper story alleging the existence of a scandal, scheme or swindle involving the Government and the existence of clandestine memoranda in connection therewith will, according to the Second Circuit, divest a federal district court of jurisdiction with regard to any *qui tam* action prosecuted by a private citizen who does, in fact, possess one of the clandestine memoranda. Such a simplistic interpretation and application of Section 232 (C) by the Second Circuit totally disregards the specificity, materiality and significance of the information possessed by the private citizen. Such an interpre-



tation and application of the jurisdictional provisions of The False Claims Act is also directly contrary to the purpose of the Act and literally serves to bar any private United States citizen from instituting a *qui tam* action no matter how great the fraud, if a suspicious newspaper reporter prints his theories and ideas regarding the fraud several days before the private citizen files suit, and the newspaper article has been placed in the files of a Governmental agency.

The reference in the *Times* article to the Kurrus memorandum apparently led the District Court to conclude that the Justice Department would inevitably have secured the document although it was not in the Department's possession at the time the Relator filed suit. (A.12)[18] The Second Circuit apparently felt that the additional information in the Kurrus memorandum regarding the complicity of MarAd officials was adequately covered in the *Times* article *supra*. Yet it is difficult to perceive how the Justice Department's possession of a newspaper clipping with an extremely vague synopsis of the document in question can be equated in significance with the actual physical possession of the document containing the specific information.

Unfortunately, the Second Circuit has chosen to interpret and apply Section 232 (C) of the False Claims Act in this manner and accordingly has chosen to restrict and severely limit the ability of private citizens to bring forward mate-

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[18]The New York Times, on occasion has opposed subpoena for documents in its possession. See *Branzburg v. Hayes*, 408 U.S. 665 (1972). Attorney Kurrus would have been obliged to raise the attorney-client privilege inasmuch as the Burmah respondents themselves in this action attempted to preserve that claim.

rial documents evidencing the perpetration of major frauds against the United States Government. Once a newspaper reporter enunciates his ideas and theories in his column as to alleged improprieties and clandestine memoranda, and the story is placed in the files of a governmental agency, a *qui tam* action by a private citizen possessing one of the clandestine memoranda is effectively barred.

Congress realized that granting private citizens the right to sue to recover Government monies paid out as a result of fraudulent claims would be an important check on bureaucratic abuses — in certain carefully restricted circumstances — and a valuable adjunct to governmental prosecutorial activity. Compare *J. I. Case Co. v. Borak*, 377 U.S .426, 434, 84 S.Ct. 1555, 12 L.ed.2d 423 (1964); *Grace v. Ludwig*, 484 F.2d 1262; 1267 (2d Cir. 1973), *cert. den.* 416 U.S. 905 (1974).

The False Claims Act is remedial in nature and has been interpreted by the Supreme Court broadly; *United States v. Bornstein*, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed. 2d 514 (1976); *United States v. Neifert-White Co.*, 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed. 2d 1061 (1968; *United States ex rel. Marcus v. Hess*, 317 U.S. 536, 63 S.Ct. 379, 87 L.Ed. 443 (1943); and remedial statutes must be construed to effectuate the purpose intended. *S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 80, 195, 84 S.Ct. 275, 11 L.Ed.2d 337 (1963); *J. I. Case v. Borak, supra*, at 433. *Cf. Abrahamson v. Fleschner*, .... F2d. ..... [Current] CCH Fed. Sec. L. Rep. ¶95,889 at pages 91273-91274 (2d Cir. 1977). A writ of certiorari should therefore be issued to correct the Second Circuit's erroneous interpretation and application of the False Claims Act and to



breathe vitality back into its provisions as Congress had intended.

B. The Second Circuit has erroneously expanded the jurisdictional barrier posed by Section 232 (C) of The False Claims Act beyond the limits intended by Congress.

As is evident from a review of the Act's legislative history, Congress in amending the False Claims Act in 1943, did not intend to deny access to the Courts, except *where it was clear that a relator was merely copying public information*. A denial of access here is in effect a denial of a remedy, which should not be countenanced.

There is nothing novel about frauds on the United States Government. The Courts and commentators recognize that the original impetus for the Act was the widespread fraud in making claims in connection with the supply of goods and services to the federal government during the Civil War. The purpose of the Act was to encourage the apprehension of profiteers by providing reasonable financial incentives to private parties to expose and prosecute frauds against the Government. *United States v. Bornstein, supra* at 309-310, n.5; *U.S. ex rel. Marcus v. Hess, supra* at 544; *Rainwater v. United States*, 356 U.S. 590, 592 (1958); *U.S. v. McNinch*, 356 U.S. 595 at 599 (1958); *See* Note, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 NORTHWESTERN U.L. REV. 446 (1972).

"The Supreme Court has said that the congressional purpose behind the False Claims Act was to 'protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made.' *Rainwater v.*

*United States, supra,* 356 U.S. at 592, 78 S.Ct. at 948. In short. the purpose was to stop the 'plundering of the public treasury.' *United States v. McNinch, supra,* 356 U.S. at 599, 78 S.Ct. at 950. While it is clear that the False Claims Act was not designed to reach every kind of fraud practiced on the United States, *United States v. McNinch, supra,* at 599, 78 S.Ct. 950; . . . it is equally clear that its purpose was to reach 'all fraudulent attempts to cause the Government to pay out sums of money.' *United States v. Neifert-White Company, supra,* 390 U.S. at 233, 88 S.Ct. at 962." [*United States v. Silver,* 384 F. Supp. 617, 619 (E.D. N.Y. 1974), aff'd 515 F.2d 505 (2d Cir. 1976).]

The pattern of widespread corruption which led to the passage of the Act in 1863 mushroomed during World War II, leading to a significant amount of litigation under the Act. *See,* 67 NORTHWESTERN U.L. REV., *supra,* at 455. Among these was a new breed of suit which became known as the "parasitic" False Claims Act suit. These were cases where, following a criminal indictment for defrauding the federal government, private litigants merely copied, frequently *in haec verba,* the indictment and findings of the grand jury into their own civil complaints. The Justice Department found itself forced to prepare its own civil complaints prior to obtaining any indictment in order to win the race to the courthouse. 89 *Cong. Rec.* 7571, 7572 (1943).

One of these cases led to the 1943 amendments to the Act. That case, *Marcus v. Hess, supra,* involved the rigging of bids by electrical contractors on Pittsburgh Public Works Administration projects. The Third Circuit denied recovery to the private litigant on the ground that Congress, when it enacted the



statute, did not intend to reward those who merely copied government indictments. 127 F.2d 233 (1942).

This Honorable Court reversed, and found that the Act did not specifically require that the private litigant contribute any new information. The purpose of the Act was to encourage private suits to recover money from those who would "cheat the United States", and this purpose was not inconsistent with piggybacking on government indictments. The decision concluded that only Congress, and not the Supreme Court, could change the law so as to prohibit so-called "parasitic" civil actions. 317 U.S. at 544-46.

Mr. Justice Jackson dissented and argued that Congress did not intend to reward private litigants unless they based their suit on information not in the possession of the Government. His argument was predicated upon an analysis in an *amicus* brief which had been submitted by the Department of Justice.

After that decision, then Attorney General Biddle sent a memorandum to Congress to revise or entirely eliminate the *qui tam* provisions of the False Claims Act. See S. Rep. No. 291, 78th Cong., 1st Sess. (1943). Biddle said that the competitive scramble with private litigants was impairing the ability of the Justice Department effectively to prosecute fraud against the Government. He said the Government no longer needed private attorney generals as it had in 1863, when the statute was enacted. By the end of 1943, approximately 250 suits seeking damages totalling $144 million had been filed by private litigants. See 89 *Cong. Rec.* 7581, 7572, and 10,845-46 (1943).

Congress responded by enacting the amendments of 1943. In March of that year the House of Representatives passed H.R. 1203, entitled "A Bill to Eliminate Private Suits for Penalties

and Damages Arising Out of Frauds against the United States," which would have entirely proscribed *qui tam* actions. This bill was rejected by the Senate. The bill which ultimately was passed into law merely limited *qui tam* actions, at the same time severely reducing the share of any recovery to which the private litigant would be entitled. See 89 *Cong. Rec., supra,* at 7571-80 and 7596-97 *passim.* The 1943 Act, therefore, reaffirmed a continuing Congressional belief in the efficacy and usefulness of *qui tam* actions, while controlling certain abuses which had grown along the fringes of the original legislation.

When in March of 1943, the House of Representatives had passed H.R. 1203, the House's action was substantially without debate. 39 *Cong. Rec.* 7577 to 7578 (1943).

Thereafter the Senate Committee on the Judiciary, Chaired by Senator Van Nuys, introduced into the Senate a modified version designed to eliminate the *qui tam* suit only under certain conditions. See Sen. Rep. No. 291, 78th Cong. 1st Sess. (1943). Even these conditions were subsequently liberalized after debate and conference committee action by the Senate and House.

## THE SENATE DEBATES ON H.R. 1203

Senator Van Nuys of Indiana, Chairman of the Committee of the Judiciary, offered an amendment to Section 3491 of the Revised Statutes (31 U.S.C. §232) which would have ousted the Court of jurisdiction if the relator's suit was not

> "based upon information, evidence, and sources *original with such person* and not in the possession of or obtained by the United States in the course of any investigation or proceeding instituted or conducted by it." [emphasis added]



He offered in detail Attorney General Biddle's views. 89 *Cong. Rec.* pp. 7570-7572.

Thus at pages 7571 and 7572, Chairman Van Nuys was concerned about copying from public government proceedings:

> In other words, the informer would have no personal knowledge of the facts at all, but would hurry to the courthouse as soon as a grand-jury indictment was returned in open court and copy verbatim the language of the indictment, changing the caption and the prayer from a criminal action to a civil action. [page 7571]

It was clearly his intent however to "protect bona fide, honest informers." 89 *Cong Rec.*, also at pages 7608-7609.[19]

There was substantial debate over the requirement that the information had to be "original" with the relator. *Ibid.* at 7573-7576, 7596-7597; and 7609-7614.

At page 7615 Senator Wheeler of Montana moved to strike out the language "original with such person" and stated that:

> If that is done, it seems to me it could eliminate one of the most objectionable features which has been complained of because then a citizen would not be confined to evidence which was original to him. Certainly in Court, no person should be confined to the proposition that all the evidence must originate with him and that if he obtains evidence from some other source he cannot use it. If that were true in any trial a great many suits could not be maintained. Certainly a man

[19] "Mr. VAN NUYS. Mr. President, taking up the bill at this time, and discussing it by sections, let me say that all of page 1, down to line 3 on page 2 ending with the word "suit" is written exactly in the words of the old law of 1863. *From there on we tried to protect bona fide honest informers.*" [emphasis added]

should be able to use any evidence he can procure, which is not in the possession of the United States, or does not originate from a grand jury investigation or an investigation by a committee of Congress, or something of that kind.[20]

Chairman Van Nuys agreed to adopt the foregoing amendment when it went to conference. *Ibid.* 7615-7616.[21] The Conference Report is found at page 10844 of Volume 89 of the *Congressional Record* and the debate in conection therewith is referred to in *United States ex rel. Vance v. Westinghouse Electric Corp.*, at pages 1041-1042, and particularly n.4 at page 1042.

From the foregoing, the intent of the Senate which, in contrast to the House, actively debated the bill, can be synthesized as follows: The Court should have jurisdiction even if the relator was not the original source of information, provided that a relator had not copied that information from some public proceeding. *U.S. ex rel. Ronald Davis, Plaintiff v. Long's Drugs Inc.*, 411 F.Supp. 1144 (S.D. Cal. 1976).

Indeed, the District Court in *U.S. Ex Rel Donald Davis, Plaintiff* expressly rejected the argument that Section 232(C) was designed to reach more than just those cases where the plaintiff "pirated his information from government sources":

"Defendants emphasize here the case of *United States v. Aster*, 176 F.Supp. 208 (E. D. Pa. 1959) *aff'd.* 275 F.2d 281

[20]Relator Greenberg while bringing to the attention of the Government evidence not original with her, that is, it apparently emanates from the files of Burmah and its representatives, did not copy from any grand jury investigation or from any investigation of a Congressional committee. For, at the time she filed, there had not been any.

[21]The amendment was adopted and the language deleted.



(3d Cir. 1959), . . . in arguing that section 232(C) was designed to reach more than just those cases where plaintiff pirated his information from government sources. This court has serious reservations though as to the validity of the *Aster* decision in light of the above legislative history which indicates that *Congress intented to eliminate only parasitical suits* and the recent opinion of the Supreme Court in *United States v. Neifert-White*, 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed2d 1061 (1968). It would not appear consistent with the Congressional purpose to bar false claim actions brought on behalf of the government when the relator possesses *original* information which he has voluntarily turned over to the United States prior to commencing suit and the government declines to act to protect the public treasury. [Emphasis Added]

In contrast with the policy of section 232(C) to limit suits not based on original information, the policy underlying the principal section of the False Claims Act, section 231, is to protect the United States Treasury from all maner of fraudulent claims. The Supreme Court has recently held that the False Claims Act is to be liberally construed to further the policy of compensating the United States for fraudulent claims. The Supreme Court in *United States v. Neifert-White*, 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968) examined the legislative history of the Act and stated:

> Debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government. In its present form the Act is broadly phrased to reach any person who makes or causes to be made 'any claim upon or against' the United States . . . *In the various*

*contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil.* See, *e.g., United States ex rel. Marcus V. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943).' (emphasis added). 390 U.S. at 232, 88 S.Ct. at 962."

[*U.S. ex rel. Ronald Davis, Plaintiff*, supra, at 1152.]

## THE RELATORS ACTION WAS NOT A PARASITIC ACTION

From the foregoing legislative history, it is clear that the 1943 edition of subsection C to Section 232 of the False Claims Act was designed to prevent the filing of "parasitic" actions, actions by parties who have no information of their own to contribute, and who merely plagiarize information in indictments returned in the courts, newspaper stories, or Congressional investigations. See *United States ex rel Sherr v. Anaconda Wire & Cable Co.*, 57 F.Supp. 196, 107-08 (S.D.N.Y. 1944) aff'd 149 F.2d 680 (2nd Cir.) cert. den. 326 U.S. 762 (1945). In the present action, specific and detailed information provided by the Relator by virtue of the Kurrus Memorandum can hardly be characterized as a plagiarization of the *New York Times* article of August 19, 1976. The Relator's action is, therefore, *not* a "parasitic" action which Section 232(C) was intended to prevent and should not have been dismissed. The Second Circuit's expansion of the jurisdictional barrier posed by Section 232(C) beyond the limits intended by Congress creates a dangerous precedent which will frustrate and discourage the filing of *qui tam* actions by bona fide informers who can provide the Government with documents which at the time of suit, are not in its possession. Such an unwarranted restriction of access to the federal



courts totally ignores this Honorable Court's directive to avoid a "rigid, restrictive reading" when confronted with a question regarding the proper construction of the False Claims Act, *United States v. Neifert White*, *supra*, 390 U.S. at 232, 88 S.Ct. at 962.

## III.

## THE DAMAGES TO THE UNITED STATES AND ITS TAXPAYERS ARE ALREADY SUBSTANTIAL. THE DOCUMENTARY EVIDENCE ESTABLISHES THAT RESPONDENTS KULUKUNDIS, CHEN AND BURMAH, AIDED AND ABETTED BY THE OTHER RESPONDENTS, ENGAGED IN A SUBTERFUGE TO DEFRAUD THE GOVERMENT AND TO CAUSE FALSE APPLICATIONS FOR FINANCING TO BE FILED WITH MARAD.

The essence of the alleged fraud is that deliberately false applications were submitted to MarAd, claiming that the applicants were United States citizens, when in fact they were not, inasmuch as they were controlled by Burmah (A.128-136).

The Government has already paid out $79 million in connection with ship construction financing for the Cryogenic Companies established by Burmah (A.34). See Paragraph 18 of the Nemirow Affidavit (A.106). The construction cost for the three vessels which are nearing completion is $280 million. Approximately $150 million of the foregoing is guaranteed under Title XI Financing. The United States has guaranteed the prompt payment in full of interest and unpaid principal in the event of default in payment of funds borrowed to

finance the construction. [Nemirow Affidavit ¶¶6 and 18] (A.102; 106)

If Burmah failed to meet the interest payments and other carrying charges of the loans as well as the principal thereof when they become due, the United States Government will in all likelihood have to make those payments. This is by no means a remote possibility, as Burmah today is not financially a healthy company. Its financial plight was referred to in a footnote on the first page of Exhibit 14 of the Government's moving papers:

> "Burmah Oil has been much in the news lately. The British Government was required to step in and guarantee a large part of Burham's dollar obligations in light of Burmah's large losses during the past year in its tanker operations. *See, N.Y. Times* (city ed), Jan. 3, 1975, p. 37, c.1; the *Wall Street Journal* (Eastern ed.), Jan. 3, 1975, p. 6, c.1."

Since that time Burmah has incurred increasing losses, reporting for the six months ended June 30, 1976 a loss after taxes of approximately thirteen and one-half million pounds or approximately $24 million.

If, in fact, Burmah controlled directly or indirectly by contract, understanding, arrangement or any other means the applicants for C.D.S. Financing or for Title XI Financing, i.e., the Cryogenic Companies in connection with the Easco Transaction or the Cherokee Companies in connection with the Pertamina Transaction, it must follow that false claims have been submitted to the Government.

The significance of this was not lost on Mr. Blackwell of MarAd in his private correspondence of May 1, 1975 with one of the parties in connection with the applications of the Cherokee Companies when he wrote:



> I have read with concern the recent exchange of correspondence between the Energy/Cherokee interests and Burmah Oil Incorporated. Many of the facts set forth in these letters do not comport with the understanding of the project held by the Maritime Administration nor in our view with the representations made to us when we considered and issued the commitment to guarantee obligations incurred in the financing of the five LNG vessels being constructed at General Dynamics. If the letters of April 18 and April 28 from Burmah are accurate reflections of the status of the parties, substantial doubt is created concerning compliance with the citizenship requirements of section 2 of the Shipping Act, 1916, as amended.
>
> Since Title XI guarantees are available only to persons qualified as United States citizens pursuant to section 2 who are in no way subject to control by non-citizen interests, will be necessary to immediately define with some degree of specificity the roles of the participants in this transaction.

Blackwell did not really want all the facts to come to light as is indicated by his exchange with Burmah's attorney on May 8th, reflected on page 3 of the Kurrus Memorandum.

> "I (Kurrus) explained that the real problem vis-a-vis the Energy people arose because of the special legal problems concerning the Title XI financing and that everyone recognized that the structure that MarAd had approved in this deal (and in other similar deals such as Maritime Fruit Carriers, Ultramar, Shell, A.J. Chandris etc.) was based on fiction. *He (Blackwell) said that he recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy.*
>
> I explained that we obviously were not interested in provoking such a legal battle if it could reasonably be avoided, but the way that this deal is presently struc-

tured is an unviable and impossible situation for Burmah. If we cave in to the Energy people, we would in a real way be submitting to blackmail. Furthermore, there is a valid argument I believe that the Energy people would be permitted to profit unduly and unconscionably through a United States Government contract.

Mr. Blackwell admitted that there appears to be several things basically wrong with the overall structure of this deal that should be rectified if possible." [Emphasis added—parenthetical material ours.]. (A.59).

Any doubt as to control by Burmah of the Cryogenic and Cherokee Companies as well as over the entire transactions is dispelled by the document entitled

"A Proposal to Japan Line, Ltd. for the Formation of a Transportation Joint Venture of Liquified Natural Gas", authored by the defendant Burmah Oil Tankers Limited, a Bermuda corporation and wholly owned subsidiary of Burmah with offices at 1185 Avenue of the Americas, New York, New York 10036 and dated May 29, 1975. (A.141).[22]

That document discusses the Pertamina and Easco transactions as follows:

"In addition to the five LNG carriers which are the principal subject of this suggested joint venture Burmah also has under construction three other LNG carriers also at General Dynamics, making a total of eight ships in all. At present the first second and fourth ships to be delivered are designated as the "Easco" ships and the remaining five ships considered in this proposal are designated as the "Cherokee" ships. In the case of the Easco ships, financing has been com-

[22]This document was not submitted by relator with the Complaint and Schedule A (A. 138).



pletely arranged and the first of the Easco vessels is scheduled for delivery in November, 1976. Because the financing has been arranged with Title XI and Construction Differential Subsidy ("CDS") has been approved for the Easco ships, they will be operated under U.S. flag conditions."

* * *

The proposal discusses the anticipated profitability of the transactions and the background. Burmah's control is substantiated in those sections of the proposal relating to Background, as follows:

"III BACKGROUND

All eight vessels are being constructed by the General Dynamics Shipbuilding Division at Quincy, Massachusetts. These vessels are now estimated for delivery from November 1976 to April 1979 at three to six month intervals.

The three Easco vessels were originally dedicated to the transportation of LNG from Algeria to the East Coast of the United States for a joint venture of two utilities ("Eascogas"). However, in July 1974 the Algerians rescinded the LNG sales contract underlying the transportation agreement. As a result of this action and the subsequent delay in formation of a new sales contract, Burmah has notified Eascogas that these ships could no longer be exclusively reserved for the Eascogas project. Instead, it is contemplated that these ships will be considered to fulfill the requirements of the transportation agreement which Burmah signed with Pertamina for the transportation of Indonesian gas to Japan. However, this is not definite and the possibility of a new transportation agreement with Easco is also being considered.

In addition to these vessels, Burmah Tankers has also caused an additional five identical ships to be contracted at General Dynamics to service the Pertamina Transportation Agreement, the basic terms and conditions of which are summarized in Section V of this proposal. This agreement provided a major advantage in that the Indonesian liquefaction plant is scheduled for completion in early 1977. In most LNG transportation projects, it is not unusual for the first vessel to be delivered and proceed directly into layup to await the completion of the liquefaction plant.

"The Easco ships are being constructed with Construction Differential Subsidies of $21,252,000 per ship and Title XI guaranteed financing provided by the U. S. Government. The remaining five have a preliminary commitment for U. S. Government Title XI construction financing and Construction Differential Subsidy is not contemplated. The U. S. Government provides these shipbuilding incentives with the requirement that the vessels be operated under U. S. registry with at least 51% U. S. ownership. As noted previously, registration under non-U. S. flag of the Easco ships would possibly require repayment of the construction subsidies. Even with repayment of subsidy the construction costs are less than $95,000,000 and could not be duplicated anywhere else in the world.

"As noted the construction and long-term financing for the Easco vessels has been arranged. The ownership of these three vessels rests in a financial group led by the First National City Bank and includes The First National Bank of Chicago and General American Transportation Corporation (GATX), a major transportation leasing company. In the case of the second series of five ships, neither the construction or long-



term financing arrangements are yet complete and at the present time, Burmah Oil is providing the funds for the construction of these five ships. Steps will soon be taken to arrange both the construction and long-term financing. Therefore, if non-U.S. flag operation is to be considered, a decision must be made before U.S. financing is finalized.

"While the details of ownership and operation are complex, all eight ships are, in one form or another, guaranteed by Burmah. Since Burmah is to be the long-term charterer of the ships, and it has guarantee construction financing and the time charter payments, that supports the long-term financing. Clarification of the various interrelationships can be provided. *At this time, it is sufficient to state that the purpose of the different corporations is to provide got [sic] U.S. construction benefiting for Title XI financing.*" [Emphasis Added]

## CONCLUSION

Both the interpretation and the application of the jurisdictional provisions of the False Claims Act by the courts below create a precedent which severely limits the ability of private citizens who possess material documents evidencing the perpetration of a major fraud against the U.S. Government from bringing to light and prosecuting on behalf of the Government those individuals who are responsible.

The Relator has shown that the Government has paid out over $60 million in subsidies which are illegally benefiting a foreign corporation. These subsidies amount to an illegal credit approximately three times that granted to the Lockheed Corporation, and unless the decisions of the courts below are reversed, the dismissal of the Relator's action stands as precedent for U.S. financing of foreign-owned tankers in direct violation of the Merchant Marine Act of 1936.

For the reasons stated, Petitioner prays that her Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted.

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## PROOF OF SERVICE

Proof of service of three copies of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit upon each of the parties separately represented by counsel was filed by FRANK G. NEWMAN, a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the petitions were filed.